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NO. 99-1548

IN THE
SUPREME COURT OF THE UNITED STATES

In re the Detention of RICHARD G. TURAY

RICHARD G. TURAY,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN PARTIAL OPPOSITION TO PETITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court held that the Kansas law authorizing commitment of sexually violent predators is civil in nature and does not violate the double jeopardy or *ex post facto* clauses. The Kansas law was modeled on Washington's Sexually Violent Predator Statute and the two laws are substantially similar. This case presents the following question regarding Washington's Sexually Violent Predator Statute:

Whether an otherwise valid civil statute can be divested of its civil nature and held to violate the double jeopardy clause because the administrative agency operating the commitment facility fails to provide for treatment and other conditions of confinement mandated by statute at some time during the individual's commitment.

The additional issues raised in Petitioner's writ for certiorari do not merit review for the reasons stated below.

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF CASE 1

A. Washington's Sexually Violent Predators Statute 1

B. Turay's Commitment as a Sexually Violent Predator 5

C. Turay's 42 U.S.C §1983 Civil Rights Lawsuit 7

D. Washington Supreme Court Affirms Turay's Commitment 9

ARGUMENT 12

A. The Court Should Grant Certiorari On Petitioner's "As Applied" Double Jeopardy Challenge And Consolidate With *Seling v. Young* 12

B. Petitioner's Request For Certiorari Based On An "As Applied" Ex Post Facto And Substantive Due Process Claim Should Be Denied Because These Issues Were Not Raised Before The Washington Supreme Court 13

C. Petitioner Identifies No Conflict Justifying Review Of The Trial Court's Evidentiary Ruling Excluding Irrelevant Evidence Relating To Conditions Of Confinement From The Commitment Hearing 14

D. Petitioner Identifies No Conflict Justifying Review Of Washington's Annual Review Procedures 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Foucha v. Louisiana, 504 U.S. 71 (1992) 18

Hudson v. United States, 522 U.S. 93, 96 (1997) 9, 10, 11, 13

In re the Detention of Turay, 139 Wash.2d 379, 986 P.2d 790(1999) passim

In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993) 5, 6

Kansas v. Hendricks 521 U.S. 346 (1997) passim

United States v. Halper, 490 U.S. 435 (1989) 9

Young v. Weston, 192 F.3d 870 (9th Cir. 1999), *cert. granted sub nom. Seling v. Young*, ___ U.S. ___, No. 99-1185 (2000) 9, 10

Statutes

§ 71.09.020(1) 2, 15, 16

§ 71.09.020(2) 2

§ 71.09.030 2

§ 71.09.040(2) 2

§ 71.09.050(1) 3

§ 71.09.050(2) 3

§ 71.09.050(3) 3

§ 71.09.060(1) 3, 15

§ 71.09.060(3) 5

§ 71.09.070 3

§ 71.09.080(1) 4

§ 71.09.080(2) 5

§ 71.09.090 2, 4

§ 71.09.090(2) 4, 18

42 U.S.C. § 1983 7, 12

Rules

Wash. Evid. R. 402 16

Wash. Evid. R. 403 16

INTRODUCTION

The State of Washington, through the King County Prosecuting Attorney, comes before this court in only partial opposition to petitioner's writ of certiorari. The State of Washington respectfully asks this court to grant certiorari on the "as applied" civil versus criminal double jeopardy issue and to consolidate the current matter with the pending case of *Seling v. Young*, No. 99-1185 which also addresses the "as applied" double jeopardy issue. Certiorari should be denied on all remaining issues.

In the current case, unlike *Seling v. Young*, petitioner's "as applied" double jeopardy claim was fully adjudicated before the trial court based on an extensive factual record. The record that *Young* lacks due to its procedural posture is thus present in the current case. As a result, the current case provides a complete context in which to examine the "as applied" challenge and the opportunity to further to define the "clearest proof" standard that applies to a civil versus criminal double jeopardy analysis.

STATEMENT OF CASE

Following a long history of sexual predation, petitioner Turay was committed under Washington's civil commitment law for sexually violent predators, Wash. Rev. Code § 71.09 (Statute). Before this court, Turay disputes neither the mental condition that predisposes him to commit acts of sexual violence nor does he question his real danger to commit further acts of rape against women if not confined in a secure facility. Instead, he seeks release based on allegedly inadequate conditions at the commitment facility unrelated to the legitimate and constitutional reasons for placing him there.

A. Washington's Sexually Violent Predators Statute

The Washington Statute providing for the civil commitment of sexually violent predators served as the

model for the Kansas Act that was upheld by the Court in *Kansas v. Hendricks*, 521 U.S. 346, 387 (1997) (Breyer, J., dissenting). The Washington and Kansas statutes are identical in all relevant respects except that, unlike the Kansas Act upheld in *Hendricks*, Washington's Statute authorizes the treatment of persons committed under its terms in settings less restrictive than total confinement. Wash. Rev. Code § 71.09.090[1], Resp. App. at 25-26.

As with the Kansas Act, the Washington Statute defines a "sexually violent predator" as a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility". Wash. Rev. Code § 71.09.020(1), Resp. App. at 14. A "mental abnormality" is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others". Wash. Rev. Code § 71.09.020(2), Resp. App. at 14.

Under the Statute, the county prosecutor (or Attorney General acting on the prosecutor's behalf) may file a petition in superior court alleging that a person is a sexually violent predator. Wash. Rev. Code § 71.09.030, Resp. App. at 17-18. Within 72 hours of the petition's filing, a hearing is held to determine whether there is probable cause to detain the person pending trial. Wash. Rev. Code § 71.09.040(2), Resp. App. at 19. The Statute provides for a right to trial within 45 days of

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[1] The provisions of Washington's Statute as it existed when respondent was committed, are set forth in Resp. App. at pages 1-11. The Statute was subsequently amended, and the current version of the law is set forth in the Resp. Appendix at pages 12-36. We cite to the current version of the Statute, except as otherwise indicated.

the probable cause determination. Wash. Rev. Code § 71.09.050(1), Resp. App. at 20.

Throughout the trial proceedings, the detained person is entitled to counsel and to have qualified "experts or professional persons" perform an evaluation on his or her behalf. Wash. Rev. Code § 71.09.050(2), Resp. App. at 20. The Statute allows for trial by jury and requires a unanimous verdict in order for the detained person to be adjudged a sexually violent predator. Wash. Rev. Code §§ 71.09.050(3), .060(1), Resp. App. at 21. At trial, the State must prove beyond a reasonable doubt that the person is a sexually violent predator. Wash. Rev. Code § 71.09.060(1), Resp. App. at 21.

If the jury finds the person to be a sexually violent predator, he or she is committed to the custody of the Department of Social and Health Services (DSHS) "for control, care, and treatment" in a secure facility until the person's mental abnormality has so changed that he or she is safe to be at large, or to be conditionally released to treatment in an environment less restrictive than total confinement. Wash. Rev. Code § 71.09.060(1), Resp. App. at 21.

Each person committed under the Statute is entitled annually to a current evaluation of his or her mental condition, danger to re-offend in a sexually violent manner, and amenability to treatment in a less restrictive setting than total confinement. Wash. Rev. Code § 71.09.070, Resp. App. at 23. The statute requires that a report of this evaluation be provided to the committed individual and to the committing court. Wash. Rev. Code § 71.09.070, Resp. App. at 23.

If the report determines that the person is no longer a sexually violent predator or if the person is appropriate for a less restrictive alternative to total confinement, the Secretary of the Washington Department of Social and Health Services (DSHS) is required to petition the committing court for a new disposition. Wash. Rev. Code § 71.09.090(1), Resp. App. at 25. Notwithstanding the Secretary's determination, the Statute

automatically requires judicial review of the commitment each year unless affirmatively waived by the committed person. Wash. Rev. Code § 71.09.090(2), Resp. App. at 25-26. In addition, the committed person may petition the court "at any time" for an unconditional discharge or treatment in a less restrictive setting. Wash. Rev. Code § 71.09.090, Resp. App. at 25-26.

The statute requires a new trial to re-determine a person's commitment status or amenability to a less restrictive alternative whenever the Secretary petitions the court under Wash. Rev. Code § 71.09.090(1), Resp. App. at 25. In addition, a re-commitment trial is required whenever "probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged." Wash. Rev. Code § 71.09.090(2), Resp. App. at 25-26. Any resulting re-commitment or less restrictive alternative trial proceeds in the same manner as an original commitment trial with the burden on the State to prove its case beyond a reasonable doubt. Wash. Rev. Code § 71.09.090(2).

Although a person adjudged a sexually violent predator is involuntarily committed, the Statute preserves the committed person's civil rights: "Any person subjected to restricted liberty as a sexually violent predator pursuant to this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter." Wash. Rev. Code § 71.09.080(1), Resp. App. at 23. Consistent with its purpose of committing sexually violent predators for "control, care, and treatment", the Statute specifically requires that "[*a*]*ny person committed pursuant to this chapter has the right to*

adequate care and individualized treatment." Wash. Rev. Code § 71.09.080(2), Resp. App. at 23-24 (emphasis added).[2]

The Statute does not specify a particular facility in which statutorily mandated control, care, and treatment is to be provided. It prohibits incarceration in a state correctional facility, but as was the case in Kansas, confinement in a mental health facility that is located within a correctional institution is authorized.[3] Wash. Rev. Code § 71.09.060(3), Resp. App. at 22; Wash. Rev. Code § 10.77.220; *Hendricks*, 521 U.S. at 379 (Breyer, J., dissenting). DSHS operates a secure facility for this purpose called the "Special Commitment Center" (SCC).[4]

B. Turay's Commitment as a Sexually Violent Predator

Petitioner's initial civil commitment occurred in October 1991. Following the decision of the Washington Supreme Court in In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993), petitioner received a new trial because his initial commitment verdict was not unanimous. Pet. App. 83.

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[2] The requirement for adequate care and individualized treatment in the current version of the Statute carries over from the original law that required that "[t]he involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment." Wash. Rev. Code § 71.09.080 (1990), Resp. App. at 24.

[3] Until 1998, the SCC was located within a Department of Corrections facility in Monroe, Washington. It is now located on McNeil Island, within the boundaries of the McNeil Island Corrections Center.

[4] Not all sexually violent predators are detained and treated at the SCC. Several individuals, having been deemed safe to reside in community treatment, reside in half-way house-type placements or in private residences. In addition to receiving on-going treatment, these individuals are subject to monitoring requirements. *See, e.g., In re Peterson,* Snohomish Cy. Cause No. 92-2-05722-9; *In re Aqui,* King Cy. Cause No. 92-2-23217-1.

While awaiting his second commitment trial, on January 12, 1994, Turay filed a motion to dismiss based on unconstitutional conditions of confinement. In conjunction with this motion, Turay moved for the trial court to adopt the record of a 30-day evidentiary hearing on the conditions of confinement at the Special Commitment Center (SCC) held in *In re Young*, King Co. Sup. Ct. No. 90-2-21319-6.[5] *See* Pet. App. 87. The trial court granted the motion to adopt the record in Young and gave leave to the parties to supplement the record. *Id.* The parties submitted additional evidence for the trial court's consideration. *Id.*

Turay's second commitment trial ended with a unanimous verdict on October 5, 1994. Pet. App. at 84. After entering an order of commitment, the trial court ruled on the pre-trial conditions of confinement motion. Pet. App. at 86-102. The court concluded that certain aspects of the Special Commitment Center (SCC) program violated Turay's substantive due process rights. The court directed the State to report to the court within 30 days of the order as to the status of the conditions found to be in violation of Turay's rights. The court's order concluded by stating "[i]f the conditions noted have not been shown to have been remedied, the Court will entertain a motion for the conditional release of the Respondent." *Id.* at 102. On April 28, 1995, the State filed a report on the status of conditions at the SCC and appended the first three reports of the special master appointed to guide remedial measures imposed by the United States District Court in *Turay v. Weston*, Cause No.

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[5] Petitioner errs with his claim on page 8 n.1 that the Young record "became *Young v. Weston*, 176 F.3d 1196 [1999]." The Young record adopted by the Turay trial court is currently pending on appeal before the Washington Court of Appeals, No. 34931-7-I. The "facts" before the Ninth Circuit in *Young v. Weston* consisted exclusively of allegation made by Young.

C91-664WD -- a civil rights lawsuit brought by petitioner under 42 U.S.C. § 1983 (see discussion below).

On December 18, 1995, Turay filed a further motion to dismiss and vacate detention based on conditions of confinement. For the first time, Turay alleged that the conditions of his confinement at the SCC amounted to punishment and, therefore, that the statute "as applied" to him violated the constitutional prohibition against double jeopardy. In response to Turay's motion to dismiss, the State argued that the current conditions experienced by Turay at the SCC were not punitive. The State submitted additional evidence in opposition to Turay's motion.

On May 9, 1996, the trial court denied petitioner's "as applied" double jeopardy motion. Pet. App. at 103-117. Considering the entire record, including evidence submitted in conjunction with the prior conditions of confinement motion, the trial court found that the conditions of Turay's confinement were not punitive and that the treatment offered at the SCC met constitutional requirements. Pet. App. at 116.

C. Turay's 42 U.S.C §1983 Civil Rights Lawsuit

Much of the evidence submitted to the trial court in connection with petitioner's conditions of confinement motions arose from a civil rights lawsuit filed by Turay challenging the conditions of his confinement under 42 U.S.C. § 1983. *Turay v. Seling*, No. C91-664WD (W.D. Wash.) Petitioner's federal civil rights lawsuit continues to operate as the engine driving the "as applied" challenges raised both in the current case and in the pending matter of *Seling v. Young*, No. 99-1185.

In 1994, following a trial on the merits, a federal jury rejected all but one of Turay's claims – i.e., that the SCC defendants had failed to provide constitutionally adequate

mental health treatment. Pet. App. at 121-28. In June 1994, based on the jury's verdict, the federal district court entered an injunction requiring the SCC to bring its treatment program into compliance with constitutional standards. Order and Injunction, *Turay v. Seling*, No. C91-664WD (W.D. Wash. June 4, 1994) Noting that the Constitution requires the State to provide a person civilly committed "with access to mental health treatment which gives him a realistic opportunity to be cured or to improve the mental condition for which he was confined", the injunction directed the SCC defendants to (1) to provide for initial and ongoing training and hiring of competent therapists; (2) to implement strategies to improve trust and rapport between residents and treatment providers; (3) to implement a therapy program that includes all professionally recognized therapy components; (4) to develop and maintain individualized treatment plans that include objective benchmarks of improvement; and (5) to provide a psychologist or psychiatrist expert in diagnosis and treatment of sex offenders to supervise and consult with the treatment staff. *Id.*

The *Turay* injunction remains in effect, and the district court has been diligent in enforcing its terms. The court appointed a special master to assist the SCC defendants in achieving compliance and to report to the court on compliance. The court also has conducted periodic evidentiary hearings concerning compliance. In November 1999, dissatisfied with the pace of improvement efforts, the district court held the SCC defendants in contempt for failing to take all reasonable steps to comply with the injunction and ordered coercive monetary sanctions to commence as of May 1, 2000, unless compliance or substantial compliance was sooner achieved. Pet. App. at 129-59.

In its subsequent and most recent review hearing in April 2000, the district court found that the defendants "have made a genuine and sustained effort to bring the SCC program into compliance with the injunction" and that

compliance is approaching the point of being substantially complete.[6] The court held in abeyance the imposition of the monetary sanctions pending the outcome of a further hearing on compliance in December 2000. *Id.*

D. Washington Supreme Court Affirms Turay's Commitment

Petitioner Turay appealed a substantial number of issues to the Washington Supreme Court. With regard to his "as applied" claim, petitioner argued that "conditions at the [Special Commitment Center] are punitive and thereby render RCW 71.09 a criminal statute 'as applied' to him, and thus violative of the double jeopardy clause". *In re Turay*, 986 P.2d at 809, Pet. App. at 43. Petitioner's main support for his claim was this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989). During the pendency of Turay's appeal, the *Halper* "as applied" analysis was "disavowed" by this court in *Hudson v. United States*, 522 U.S. 93, 96 (1997).

Roughly one month before the Washington Supreme Court issued its decision in *Turay*, the Ninth Circuit recognized an "as applied" challenge under the double jeopardy and ex post facto clauses in *Young v. Weston*, 192 F.3d 870 (9th Cir. 1999), *cert. granted sub nom. Seling v. Young*, ___ U.S. ___, No. 99-1185 (2000). Although acknowledging that the Washington Statute is facially valid under this Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Ninth Circuit claimed that "*Hendricks* did not

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[6] The district court's most recent order and the most recent report of the special master have been lodged with this Court in the pending *Seling v. Young* matter. Findings Of Fact, Conclusions Of Law, And Order Re Motions Heard April 18-21, 2000, *Turay v. Seling*, No. C91-664WD (W.D. Wash.); Seventeenth Report Of The Special Master, *Turay v. Seling*, No. C91-664WD (W.D. Wash.).

preclude the possibility that the Washington statute, *as applied*, is punitive." *Young v. Weston*, 192 F.3d 870.

The Ninth Circuit rejected the State's argument that Hudson v. United States, 522 U.S. 93 (1997) limited the civil versus criminal double jeopardy inquiry "*to the statute on its face*", and not with regard to the sanction imposed in any particular case. *Hudson*, 522 U.S. at 99-100, 116 (emphasis added). In a footnote, the Ninth Circuit distinguished *Hudson* as involving "monetary penalties and occupational disablement", whereas "this case involves confinement". 192 F.3d at 874 n.4. The Ninth Circuit remanded the case for a factual hearing because Young had alleged facts which, if proved, would establish the punitive nature of his confinement and would entitle him to relief. 192 F.3d at 874-75.

Acknowledging that Turay's argument had been recently accepted by the Ninth Circuit in the *Young* case, the Washington Supreme Court expressly refused to follow the Ninth Circuit's decision:

> We are not unmindful of the fact that the Ninth Circuit Court of Appeals has recently held that *Hendricks* 'does not preclude the possibility that the Washington [SVP] statute, as applied, is punitive.' . . . *This court is, of course, not bound by that decision and, for the aforementioned reasons, we decline to follow it.*

Turay, 986 P.2d at 812, Pet. App. at 51 (emphasis added).

The Washington Supreme Court concluded that Turay's "as applied" double jeopardy challenge to the Statute, based upon the conditions at the Special Commitment Center rather than the language of the Statute,

was "flawed". 986 P.2d at 810, Pet. App. at 44. The Washington Supreme Court held that *Hudson*

> clearly stands for the proposition that, in performing double jeopardy analysis, *a court must look at the statute on its face* to determine whether it actually provides for a criminal sanction, rather than evaluating the character of the actual sanctions as imposed.

986 P.2d at 811, Pet. App. at 48-49 (emphasis added). The court explicitly rejected the Ninth Circuit's attempt to distinguish *Hudson*, stating that:

> *We believe that the Supreme Court meant what it said when it mandated in Hudson that, when performing a double jeopardy analysis, statutes must be evaluated on their face rather than assessing the character of the actual sanctions imposed* . . . . In *Hudson*, the Supreme Court expressly stated that while there are several factors which serve as useful guideposts in performing a double jeopardy analysis, none of these factors, including whether the sanction involves an affirmative disability or restraint, should be elevated to 'dispositive status' or 'considered controlling.' *Hudson*, 522 U.S. at 101.

986 P.2d at 812 n.30, Pet. App. at 48 n.30 (emphasis added).

The Washington Supreme Court rejected the remainder of Turay's challenges and affirmed the commitment decision. Petitioner Turay seeks certiorari from this decision.

ARGUMENT

A. The Court Should Grant Certiorari On Petitioner's "As Applied" Double Jeopardy Challenge And Consolidate With *Seling v. Young*

The petition for writ of certiorari filed in *Seling v. Young,* No. 99-1185, relied primarily on the explicit conflict between the decision of the Ninth Circuit Court of Appeals recognizing an "as applied" challenge and the decision of the Washington Supreme Court in the *Turay* case. There is no doubt that a conflict exists between the Ninth Circuit and the Washington Supreme Court whereby a litigant receives a different answer to a federal constitutional question depending on the judicial forum.

With the "as applied" civil versus criminal double jeopardy issue already before this court in *Seling v. Young*, the *Turay* matter provides additional context within which to decide the continuing validity of the "as applied" approach. The procedural posture of *Seling v. Young* is a habeas corpus petition where respondent Young is raising an "as applied" civil versus criminal challenge under the double jeopardy and ex post facto clauses. Because *Seling v. Young* contains no evidentiary record addressed to Young's "as applied" question, the case comes before this court based upon the Ninth Circuit's decision to remand the matter for an evidentiary hearing.

The *Turay* matter, in contrast, is a direct review arising from the decision committing Turay as a sexually violent predator. Evidence was considered by the Washington Superior Court directly on Turay's "as applied" double jeopardy claim. In addition, Turay is the plaintiff in the 42 U.S.C. § 1983 lawsuit that drives both the "as applied" claims of Young and Turay. The *Turay* case, therefore, provides a rich factual record within which to determine the "as applied" issue. Because Young and Turay are confined

in the same commitment facility, the Turay record also relates to the allegations made by Young.

Moreover, if this Court grants certiorari in *Turay* and consolidates *Turay* with *Seling v. Young*, this Court will be in a better position to explain the "clearest proof" standard that governs a civil versus criminal determination. *See Hendricks*, 521 U.S. ___ ("we will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"). In the decision below, the Washington Supreme Court determined that Turay had not presented the "clearest proof" even if the "as applied" civil versus criminal double jeopardy doctrine was valid. *Turay*, Pet. App. at 52. Given the importance of the "clearest proof" standard to civil versus criminal review, *see Hudson*, 522 U.S. 93 (1997) (Souter, J. concurring) (discussing role of "clearest proof" standard), the current case provides an opportunity to fully address this standard in the context of an established factual record.

B. Petitioner's Request For Certiorari Based On An "As Applied" Ex Post Facto And Substantive Due Process Claim Should Be Denied Because These Issues Were Not Raised Before The Washington Supreme Court

Without informing this Court, petitioner seeks to raise two derivations of the "as applied" civil versus criminal claim that were not before the Washington Supreme Court. In addition to seeking certiorari on the double jeopardy issue, petitioner also asks this court to determine an "as applied" civil versus criminal challenge under the ex post facto and substantive due process clauses. Although the "as applied" argument under the ex post facto and substantive due process clauses appears to be entirely repetitive of its double

jeopardy version, this court should deny certiorari on questions two and three in the petition for certiorari because these questions were not presented to the Washington Supreme Court and were not decided in the decision resolving Turay's appeal.[7]

In framing Turay's "as applied" argument, the Washington Supreme Court notes that it is brought under the double jeopardy clause. Pet. App. 43-44. The table of contents to Turay's brief before the Washington Supreme Court likewise confirms that his "as applied" challenge was limited to the double jeopardy clause. Resp. App. at 37-43. As a result, the Washington Supreme Court's holding in *Turay* is limited to the double jeopardy clause: "In short, we reject Turay's claim that the conditions of confinement at the SCC are punitive 'as applied' to him and thus violative of the double jeopardy clause." Pet. App. at 52-53. Because Turay failed to raise his "as applied" ex post facto and substantive due process challenges below, he should be barred from raising these claims for the first time in his petition for writ of certiorari.

C. Petitioner Identifies No Conflict Justifying Review Of The Trial Court's Evidentiary Ruling Excluding Irrelevant Evidence Relating To Conditions Of Confinement From The Commitment Hearing

Petitioner attempts to spin a run-of-the-mill evidentiary ruling based on an interpretation of the

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[7] The ex post facto and substantive due process "as applied" claims were rejected by the Washington Supreme Court in *In re the Detention of Campbell*, 139 Wash.2d 341, ___ P.2d ___ (1999). The *Campbell* decision was issued on the same day and relied largely on the *Turay* analysis in disposing of the largely repetitive ex post facto and substantive due process "as applied" claims.

controlling state statute into a federal claim that he was denied the right to present a defense. Putting aside the fact that Turay has demonstrated no prejudice to the ultimate outcome of the commitment trial based upon this evidentiary ruling, the Court should deny certiorari on question number 4 in the petition because it is largely a matter of state law.

Turay challenges the ruling of the Washington Supreme Court affirming the trial court's decision to exclude evidence relating to conditions of confinement from Turay's commitment hearing.[8] Interpreting the commitment criteria under Wash. Rev. Code § 71.09.060(1), Resp. App. at 21, the court noted that Turay's proposed evidence of conditions of confinement lacked any relevance to the statutory commitment decision:

> The trier of fact's role in an SVP commitment proceeding, as the trial judge correctly noted, is to determine whether the defendant constitutes an SVP; *it is not* to evaluate the potential conditions of confinement. . . . . The particular DSHS facility to which a defendant will be committed should have no bearing on whether that person falls within [Wash. Rev. Code §] 71.09.020(1)'s definition of an SVP. . . . As a result, the conditions at a particular DSHS facility, as well as the verdict in Turay's federal litigation are irrelevant to the determination of whether a person fits within the statutory definition of an SVP and, therefore, the trial court properly granted the State's motion to exclude this evidence.

Turay, Pet. App. at 27-28. Because the relevance of the excluded evidence flows from the Washington Supreme Court's interpretation of the commitment criteria under

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[8] The Washington Supreme Court stated that "Turay's arguments in regard to this issue are meritless and demonstrate a fundamental misunderstanding of the purpose of an SVP commitment proceeding." Pet. App. 27.

Wash. Rev. Code § 71.09.020(1), it should not be subject to review by this court through certiorari.[9]

Turay also fails to present a federal issue with his claim that evidence of conditions of confinement was improperly disallowed in response to testimony from the State's expert. The State's expert made an oblique reference to "threats to sue" during his direct examination, which Turay's attorney expanded upon during cross examination. *Turay,* Pet. App. 28. The Washington Supreme Court found no error because the relevant behavior that supported the expert's testimony was not Turay's actions in actually filing suit against the commitment center, but his continued *threats* toward others. *See Turay,* Pet. App. 30-31. The trial court's decision to exclude a long dalliance into the merits of Turay's various threats falls well within the broad discretion afforded a trial court to weight the probative and prejudicial value of proposed testimony in reaching an evidentiary ruling. *See* Wash. Evid. R. 402 (relevance), 403 (prejudice). Turay presents nothing to justify further review of the Washington Supreme Court's decision affirming the trial court's evidentiary ruling.

D. Petitioner Identifies No Conflict Justifying Review Of Washington's Annual Review Procedures

Petitioner misperceives the import of this Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997) when

[9] Of course, it is difficult to understand how conditions at the facility where Turay is housed upon commitment impact the question of whether he suffers from a mental abnormality or is more likely than not to commit further predatory acts of sexual violence. *See* Wash. Rev. Code § 71.09.020(1), Resp. App. at 14. The court also determined that such evidence is not relevant under the less restrictive alternative inquiry because the statutory focus is on inpatient versus outpatient treatment, not on the conditions at a particular inpatient facility. *See* Pet. App. at 26 n.17; Pet. App. 31.

he claims that due process requires annual recommitment hearings. In *Hendricks*, this court upheld an *indefinite* commitment scheme for sexually violent predators, not one where a full recommitment trial was required each year. This Court noted that the Kansas act established "a civil commitment law for the long-term care and treatment of the sexually violent predator." 521 U.S. at ___. The majority approved an act providing for "indefinite involuntary commitment." 521 U.S. at ___. The approved Kansas act provides for commitment that is "potentially indefinite." 521 U.S. at ___. The duration of confinement is "linked to the stated purposes of the commitment, namely to hold the person until his mental abnormality no longer causes him to be a threat to others". 521 U.S. at ___.

Even though the Kansas and Washington statutes are substantively identical, Turay claims a conflict between the Kansas review proceedings analyzed in *Hendricks* and those approved by the Washington Supreme Court in *Turay*.[10] He bases this conflict on a passage from *Hendricks*, 521 U.S. at 364, where this Court is supposedly interpreting the Kansas statute to require annual recommitment hearings.

The passage Turay cites, however, also defeats his misinterpretation of that passage. In analyzing the civil versus criminal nature of the Kansas law, this Court pointed out that commitment is only "potentially indefinite." 521 U.S. at 364. If Turay were correct that recommitment was required each year, then the commitment would not be "potentially *indefinite*;" it would instead be a series of *definite* commitments lasting one year in duration.

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[10] Ironically, the Kansas annual review procedures analyzed in *Hendricks* provide less opportunity for review than those contained in the Washington Statute. The Washington Statute currently places no limits on the number of times that a committed person may petition the court without the support of the Secretary of DSHS. *See* Wash. Rev. Code § 71.09.090, Pet. App. at 26.

Consistent with the notion of a commitment being potentially indefinite, the recommitment procedure noted by this court where the State must reprove its case refers to the trial that occurs under both the Kansas and Washington statutes if there is probable cause to believe that the person's mental condition or dangerous has changed from the time of the commitment trial. *See* Wash. Rev. Code § 71.09.090(2), Resp. App. at 25-26. Absent probable cause of change, *Hendricks* does not require an annual re-commitment trial where the State must re-prove commitment beyond a reasonable doubt.

The *Turay* decision clarifies that the State of Washington has the annual burden of producing evidence showing continuing grounds for the commitment. If such evidence is not presented, the result is a new trial where the State must prove the commitment again beyond a reasonable doubt. In this way, the problem identified in *Foucha v. Louisiana*, 504 U.S. 71 (1992) – where a commitment continues even though the state is unable to present evidence of a continuing basis for the commitment – never occurs.

Turay presents no conflict justifying certiorari on the petition's fifth question. The supposed conflict with the *Hendricks* passage is illusory.

CONCLUSION

For the foregoing reasons, the State of Washington respectfully requests that this court grant certiorari on the "as applied" civil versus criminal double jeopardy issue and consolidate this case with *Seling v. Young*, No. 99-1185, in order to provide a complete context for review of this

important issue. Petitioner's request for certiorari on all remaining issues should be denied.

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June 12, 2000

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CHAPTER 71.09
SEXUALLY VIOLENT PREDATORS

Section

71.09.010. Findings.
71.09.020. Definitions.
71.09.030. Sexually violent predator petition—Prosecuting attorney or attorney general may file.
71.09.040. Sexually violent predator petition—Judicial determination—Transfer for evaluation.
71.09.050. Trial—Rights of parties.
71.09.060. Trial—Determination—Commitment procedures.
71.09.070. Annual examinations.
71.09.080. Detention and commitment to conform to constitutional requirements.
71.09.090. Petition for release—Procedures.
71.09.100. Subsequent petitions.
71.09.110. Department of social and health services—Duties—Reimbursement.
71.09.120 Release of information authorized.
71.09.900 Index, part headings not law—1990 c 3.
71.09.901 Severability—1990 c 3.
71.09.902 Effective dates—Application—1990 c 3.

71.09.010 Findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter

71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

Enacted by Laws 1990, ch. 3, § 1001, eff. July 1, 1990.

71.09.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.

(2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(3) "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

(4) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

Enacted by Laws 1990, ch. 3, § 1002, eff. July 1, 1990. Amended by Laws 1990, 1st Ex.Sess., ch. 12, § 2, eff. July 1, 1990.

71.09.030 Sexually violent predator petition—Prosecuting attorney or attorney general may file.

When it appears that: (1) The sentence of a person who has been convicted of a sexually violent offense is about to expire, or has expired on, before, or after July 1, 1990; (2) the term of confinement of a person found to have committed a sexually violent offense as a juvenile is about to expire, or has expired on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.090(3); or (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.020(3); and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

Enacted by Laws 1990, ch. 3, § 1003, eff. July 1, 1990. Amended by Laws 1990, 1st Ex.Sess., ch. 12, § 3, eff. July 1, 1990.

71.09.040 Sexually violent predator petition—Judicial determination—Transfer for evaluation.

Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody and the person shall be transferred to an appropriate facility for an

evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections.

Enacted by Laws 1990, ch. 3, § 1004, eff. July 1, 1990.

71.09.050 Trial—Rights of parties.

Within forty-five days after the filing of a petition pursuant to RCW 71.09.030, the court shall conduct a trial to determine whether the person is a sexually violent predator. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professional person of his or her own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial be before a jury. If no demand is made, the trial shall be before the court.

Enacted by Laws 1990, ch. 3, § 1005, eff. July 1, 1990.

71.09.060 Trial—Determination—Commitment procedures

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in RCW 71.09.020(4)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care, and treatment shall be provided at a facility operated by the department of social and health services. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to or has been released pursuant to RCW 10.77.090(3), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.090(3) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent,

shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) The state shall comply with RCW 10.77.220 while confining the person pursuant to this chapter. The facility shall not be located on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.

Enacted by Laws 1990, ch. 3, § 1006, eff. July 1, 1990. Amended by Laws 1990, 1st Ex.Sess., ch. 12, § 4, eff. July 1, 1990.

71.09.070 Annual examinations

Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year. The person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her, and such expert or professional person shall have access to all records concerning the person. The periodic report shall be provided to the court that committed the person under this chapter.

Enacted by Laws 1990, ch. 3, § 1007, eff. July 1, 1990.

71.09.080 Detention and commitment to conform to constitutional requirements.

The involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment.

Enacted by Laws 1990, ch. 3, § 1008, eff. July 1, 1990.

71.09.090 Petition for release—Procedures.

(1) If the secretary of the department of social and health services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the prosecuting attorney. The court, upon receipt of the petition for release, shall within forty-five days order a hearing. The prosecuting attorney or the attorney general, if requested by the county, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of his or her choice. The hearing shall be before a jury if demanded by either the petitioner or the prosecuting attorney or attorney general. The burden of proof shall be upon the prosecuting attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.

(2) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of

rights. The secretary shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large. The committed person shall have a right to have an attorney represent him or her at the show cause hearing but the person is not entitled to be present at the show cause hearing. If the court at the show cause hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting attorney or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released will engage in acts of sexual violence.

Enacted by Laws 1990, ch. 3, § 1009, eff. July 1, 1990.

71.09.100 Subsequent petitions.

Nothing in this chapter shall prohibit a person from filing a petition for discharge pursuant to this chapter. However, if a person has previously filed a petition for

discharge without the secretary's approval and the court determined, either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that he or she was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find that the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.

Enacted by Laws 1990, ch. 3, § 1010, eff. July 1, 1990.

71.09.110 Department of social and health services Duties—Reimbursement.

The department of social and health services shall be responsible for all costs relating to the evaluation and treatment of persons committed to their custody under any provision of this chapter. Reimbursement may be obtained by the department for the cost of care and treatment of persons committed to its custody pursuant to RCW 43.20B.330 through 43.20B.370.

Enacted by Laws 1990, ch. 3, § 1011, eff. July 1, 1990.

71.09.120 Release of information authorized.

In addition to any other information required to be released under this chapter, the department is authorized, pursuant to RCW 4.24.550, to release relevant information that is necessary to protect the public, concerning a specific sexually violent predator committed under this chapter.

Enacted by Laws 1990, ch. 3, § 1012, eff. July 1, 1990.

71.09.900 Index, part headings not law—1990 c 3.

See RCW 18.155.900.

71.09.901 Severability—1990 c 3.

See RCW 18.155.901.

71.09.902 Effective dates—Application—1990 c 3.

See RCW 18.155.902.

Chapter 71.09
SEXUALLY VIOLENT PREDATORS

Sections

71.09.010 Findings.
71.09.020 Definitions.
71.09.025 Notice to prosecuting attorney prior to release.
71.09.030 Sexually violent predator petition—Filing.
71.09.040 Sexually violent predator petition—Probable cause hearing—Judicial determination—Transfer for evaluation.
71.09.050 Trial—Rights of parties.
71.09.060 Trial—Determination—Commitment procedures.
71.09.070 Annual examinations of persons committed under chapter.
71.09.080 Rights of persons committed under this chapter.
71.09.090 Petition for conditional release to less restrictive alternative or unconditional discharge—Procedures.
71.09.092 Conditional release to less restrictive alternative—Findings.
71.09.094 Conditional release to less restrictive alternative—Verdict.
71.09.096 Conditional release to less restrictive environment—Judgment—Conditions—Annual review.
71.09.098 Conditional release to less restrictive alternative—Hearing on revocation or modification—Authority to apprehend conditionally released person.
71.09.110 Department of social and health services—Duties—Reimbursement.
71.09.115 Record check required for employees of

secure facility.
71.09.120 Release of information authorized.
71.09.130 Notice of escape or disappearance.
71.09.140 Notice of conditional release or unconditional discharge—Notice of escape and recapture.
71.09.200 Escorted leave—Definitions.
71.09.210 Escorted leave—Conditions.
71.09.220 Escorted leave—Notice.
71.09.230 Escorted leave—Rules.
71.09.900 Index, part headings not law—1990 c 3.
71.09.901 Severability—1990 c 3.
71.09.902 Effective dates—Application—1990 c 3.

71.09.010 Findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The

legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act. [1990 c 3 § 1001.]

71.09.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(3) "Likely to engage in predatory acts of sexual violence" means that the person more probably than not will engage in such acts. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(4) "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

(5) "Recent overt act" means any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm.

(6) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(7) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement.

(8) "Secretary" means the secretary of social and health services or his or her designee. [1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

Effective date—1990 1st ex.s. c 12: See note following RCW 13.40.020.

71.09.025 Notice to prosecuting attorney prior to release.

(1)(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in RCW 71.09.020(1), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county where that person was charged, three months prior to:

(i) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense;

(ii) The anticipated release from total confinement of a person found to have committed a sexually violent offense as a juvenile;

(iii) Release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to *RCW 10.77.090(3); or

(iv) Release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to **RCW 10.77.020(3).

(b) The agency shall provide the prosecutor with all relevant information including but not limited to the following information:

(i) A complete copy of the institutional records compiled by the department of corrections relating to the person, and any such out-of-state department of corrections' records, if available;

(ii) A complete copy, if applicable, of any file compiled by the indeterminate sentence review board relating to the person;

(iii) All records relating to the psychological or psychiatric evaluation and/or treatment of the person;

(iv) A current record of all prior arrests and convictions, and full police case reports relating to those arrests and convictions; and

(v) A current mental health evaluation or mental health records review.

(2) This section applies to acts committed before, on, or after March 26, 1992.

(3) The agency, its employees, and officials shall be immune from liability for any good-faith conduct under this section.

(4) As used in this section, "agency with jurisdiction" means that agency with the authority to direct the release of a person serving a sentence or term of confinement and includes the department of corrections, the indeterminate sentence review board, and the department of social and health services. [1995 c 216 § 2; 1992 c 45 § 3.]

Reviser's note: *(1) RCW 10.77.090 was amended by 1998 c 297 § 38, changing subsection (3) to subsection (4).

**(2) RCW 10.77.020 was amended by 1998 c 297 § 30, deleting subsection (3).

Severability—Application—1992 c 45: See notes following RCW 9.94A.151.

71.09.030 Sexually violent predator petition—Filing.

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense

and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to *RCW 10.77.090(3); (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW **10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation. [1995 c 216 § 3; 1992 c 45 § 4; 1990 1st ex.s. c 12 § 3; 1990 c 3 § 1003.]

Reviser's note: *(1) RCW 10.77.090 was amended by 1998 c 297 § 38, changing subsection (3) to subsection (4).

**(2) RCW 10.77.020 was amended by 1998 c 297 § 30, deleting subsection (3).

Severability—Application—1992 c 45: See notes following RCW 9.94A.151.

Effective date—1990 1st ex.s. c 12: See note following RCW 13.40.020.

71.09.040 Sexually violent predator petition—Probable cause hearing—Judicial determination—Transfer for evaluation.

(1) Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a

sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody.

(2) Within seventy-two hours after a person is taken into custody pursuant to subsection (1) of this section, the court shall provide the person with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the person is a sexually violent predator. At this hearing, the court shall (a) verify the person's identity, and (b) determine whether probable cause exists to believe that the person is a sexually violent predator. At the probable cause hearing, the state may rely upon the petition and certification for determination of probable cause filed pursuant to RCW 71.09.030. The state may supplement this with additional documentary evidence or live testimony.

(3) At the probable cause hearing, the person shall have the following rights in addition to the rights previously specified: (a) To be represented by counsel; (b) to present evidence on his or her behalf; (c) to cross-examine witnesses who testify against him or her; (d) to view and copy all petitions and reports in the court file.

(4) If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. [1995 c 216 § 4; 1990 c 3 § 1004.]

71.09.050 Trial—Rights of parties.

(1) Within forty-five days after the completion of any hearing held pursuant to RCW 71.09.040, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. The person shall be confined in a secure facility for the duration of the trial.

(2) Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professional person of his or her own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

(3) The person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial be before a twelve-person jury. If no demand is made, the trial shall be before the court. [1995 c 216 § 5; 1990 c 3 § 1005.]

71.09.060 Trial—Determination—Commitment procedures.

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. When the determination is made by a jury, the verdict must be unanimous.

If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in RCW 71.09.020(6)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services for placement in a secure facility operated by the department of social and health services for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe either (a) to be at large, or (b) to be released to a less restrictive alternative as set forth in RCW 71.09.092. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to or has been released pursuant to *RCW 10.77.090(3), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to

dismissal under *RCW 10.77.090(3) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) The state shall comply with RCW 10.77.220 while confining the person pursuant to this chapter, except that during all court proceedings the person shall be detained in a secure facility. The department shall not place the person, even temporarily, in a facility on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population. [1998 c 146 § 1; 1995 c 216 § 6; 1990 1st ex.s. c 12 § 4; 1990 c 3 § 1006.]

***Reviser's note:** RCW 10.77.090 was amended by 1998 c 297 § 38, changing subsection (3) to subsection (4).

Effective date—1998 c 146: "This act is necessary for the immediate preservation of the public peace, health, or

safety, or support of the state government and its existing public institutions, and takes effect immediately [March 25, 1998]." [1998 c 146 § 2.]

Effective date—1990 1st ex.s. c 12: See note following RCW 13.40.020.

71.09.070 Annual examinations of persons committed under chapter.

Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year. The annual report shall include consideration of whether conditional release to a less restrictive alternative is in the best interest of the person and will adequately protect the community. The person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her, and such expert or professional person shall have access to all records concerning the person. The periodic report shall be provided to the court that committed the person under this chapter. [1995 c 216 § 7; 1990 c 3 § 1007.]

71.09.080 Rights of persons committed under this chapter.

(1) Any person subjected to restricted liberty as a sexually violent predator pursuant to this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter.

(2) Any person committed pursuant to this chapter has the right to adequate care and individualized treatment. The department of social and health services shall keep records detailing all medical, expert, and professional care and treatment received by a committed person, and shall keep

copies of all reports of periodic examinations made pursuant to this chapter. All such records and reports shall be made available upon request only to: The committed person, his or her attorney, the prosecuting attorney, the court, the protection and advocacy agency, or another expert or professional person who, upon proper showing, demonstrates a need for access to such records.

(3) At the time a person is taken into custody or transferred into a facility pursuant to a petition under this chapter, the professional person in charge of such facility or his or her designee shall take reasonable precautions to inventory and safeguard the personal property of the persons detained or transferred. A copy of the inventory, signed by the staff member making it, shall be given to the person detained and shall, in addition, be open to inspection to any responsible relative, subject to limitations, if any, specifically imposed by the detained person. For purposes of this subsection, "responsible relative" includes the guardian, conservator, attorney, spouse, parent, adult child, or adult brother or sister of the person. The facility shall not disclose the contents of the inventory to any other person without consent of the patient or order of the court.

(4) Nothing in this chapter prohibits a person presently committed from exercising a right presently available to him or her for the purpose of obtaining release from confinement, including the right to petition for a writ of habeas corpus.

(5) No indigent person may be conditionally released or unconditionally discharged under this chapter without suitable clothing, and the secretary shall furnish the person with such sum of money as is required by RCW 72.02.100 for persons without ample funds who are released from correctional institutions. As funds are available, the secretary may provide payment to the indigent persons conditionally

released pursuant to this chapter consistent with the optional provisions of RCW 72.02.100 and 72.02.110, and may adopt rules to do so. [1995 c 216 § 8; 1990 c 3 § 1008.]

71.09.090 Petition for conditional release to less restrictive alternative or unconditional discharge—Procedures.

(1) If the secretary determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be served upon the court and the prosecuting attorney. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing. The prosecuting attorney or the attorney general, if requested by the county, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of his or her choice. The hearing shall be before a jury if demanded by either the petitioner or the prosecuting attorney or attorney general. The burden of proof shall be upon the prosecuting attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if conditionally released to a less restrictive alternative or unconditionally discharged is likely to engage in predatory acts of sexual violence.

(2) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative or unconditional discharge without the secretary's approval.

The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be conditionally released to a less restrictive alternative or unconditionally discharged. The committed person shall have a right to have an attorney represent him or her at the show cause hearing but the person is not entitled to be present at the show cause hearing. If the court at the show cause hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting attorney or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is likely to engage in predatory acts of sexual violence

if conditionally released to a less restrictive alternative or unconditionally discharged.

(3) The jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time as the person is unconditionally discharged. [1995 c 216 § 9; 1992 c 45 § 7; 1990 c 3 § 1009.]

Severability—Application—1992 c 45: See notes following RCW 9.94A.151.

71.09.092 Conditional release to less restrictive alternative—Findings.

Before the court may enter an order directing conditional release to a less restrictive alternative, it must find the following: (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18.155 RCW; (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center; (3) housing exists that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization; (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and (5) the person is willing to comply with supervision

requirements imposed by the department of corrections. [1995 c 216 § 10.]

71.09.094 Conditional release to less restrictive alternative—Verdict.

(1) Upon the conclusion of the evidence in a hearing held pursuant to RCW 71.09.090, if the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find that the conditions set forth in RCW 71.09.092 have been met, the court shall grant a motion by the state for a judgment as a matter of law on the issue of conditional release to a less restrictive alternative.

(2) Whenever the issue of conditional release to a less restrictive alternative is submitted to the jury, the court shall instruct the jury to return a verdict in substantially the following form: Has the state proved beyond a reasonable doubt that the proposed less restrictive alternative is not in the best interests of respondent or will not adequately protect the community? Answer: Yes or No. [1995 c 216 § 11.]

71.09.096 Conditional release to less restrictive environment—Judgment—Conditions—Annual review.

(1) If the court or jury determines that conditional release to a less restrictive alternative is in the best interest of the person and will adequately protect the community, and the court determines that the minimum conditions set forth in *section 9 of this act are met, the court shall enter judgment and direct a conditional release.

(2) The court shall impose any additional conditions necessary to ensure compliance with treatment and to protect the community. If the court finds that conditions do not exist that will both ensure the person's compliance with treatment and protect the community, then the person shall be remanded to the custody of the department of social and

health services for control, care, and treatment in a secure facility as designated in RCW 71.09.060(1).

(3) If the service provider designated to provide inpatient or outpatient treatment or to monitor or supervise any other terms and conditions of a person's placement in a less restrictive alternative is other than the department of social and health services or the department of corrections, then the service provider so designated must agree in writing to provide such treatment.

(4) Prior to authorizing any release to a less restrictive alternative, the court shall impose such conditions upon the person as are necessary to ensure the safety of the community. The court shall order the department of corrections to investigate the less restrictive alternative and recommend any additional conditions to the court. These conditions shall include, but are not limited to the following: Specification of residence, prohibition of contact with potential or past victims, prohibition of alcohol and other drug use, participation in a specific course of inpatient or outpatient treatment that may include monitoring by the use of polygraph and plethysmograph, supervision by a department of corrections community corrections officer, a requirement that the person remain within the state unless the person receives prior authorization by the court, and any other conditions that the court determines are in the best interest of the person or others. A copy of the conditions of release shall be given to the person and to any designated service providers.

(5) Any service provider designated to provide inpatient or outpatient treatment shall monthly, or as otherwise directed by the court, submit to the court, to the department of social and health services facility from which the person was released, to the prosecutor of the county in which the person was found to be a sexually violent predator,

and to the supervising community corrections officer, a report stating whether the person is complying with the terms and conditions of the conditional release to a less restrictive alternative.

(6) Each person released to a less restrictive alternative shall have his or her case reviewed by the court that released him or her no later than one year after such release and annually thereafter until the person is unconditionally discharged. Review may occur in a shorter time or more frequently, if the court, in its discretion on its own motion, or on motion of the person, the secretary, or the prosecuting attorney so determines. The sole question to be determined by the court is whether the person shall continue to be conditionally released to a less restrictive alternative. The court in making its determination shall be aided by the periodic reports filed pursuant to subsection (5) of this section and the opinions of the secretary and other experts or professional persons. [1995 c 216 § 12.]

***Reviser's note:** The reference to "section 9 of this act" literally translates to the 1995 c 216 amendments to RCW 71.09.090, which appears to be an erroneous reference. Reference to RCW 71.09.092, "section 10 of this act," was apparently intended.

71.09.098 Conditional release to less restrictive alternative—Hearing on revocation or modification—Authority to apprehend conditionally released person.

(1) Any service provider submitting reports pursuant to RCW 71.09.096(5), the supervising community corrections officer, the prosecuting attorney, or the attorney general may petition the court, or the court on its own motion may schedule an immediate hearing, for the purpose of revoking or modifying the terms of the person's conditional release to a less restrictive alternative if the petitioner or the

court believes the released person is not complying with the terms and conditions of his or her release or is in need of additional care and treatment.

(2) If the prosecuting attorney, the supervising community corrections officer, or the court, based upon information received by them, reasonably believes that a conditionally released person is not complying with the terms and conditions of his or her conditional release to a less restrictive alternative, the court or community corrections officer may order that the conditionally released person be apprehended and taken into custody until such time as a hearing can be scheduled to determine the facts and whether or not the person's conditional release should be revoked or modified. The court shall be notified before the close of the next judicial day of the person's apprehension. Both the prosecuting attorney and the conditionally released person shall have the right to request an immediate mental examination of the conditionally released person. If the conditionally released person is indigent, the court shall, upon request, assist him or her in obtaining a qualified expert or professional person to conduct the examination.

(3) The court, upon receiving notification of the person's apprehension, shall promptly schedule a hearing. The issue to be determined is whether the state has proven by a preponderance of the evidence that the conditionally released person did not comply with the terms and conditions of his or her release. Hearsay evidence is admissible if the court finds it otherwise reliable. At the hearing, the court shall determine whether the person shall continue to be conditionally released on the same or modified conditions or whether his or her conditional release shall be revoked and he or she shall be committed to total confinement, subject to release only in accordance with provisions of this chapter. [1995 c 216 § 13.]

71.09.110 Department of social and health services—Duties—Reimbursement.

The department of social and health services shall be responsible for all costs relating to the evaluation and treatment of persons committed to their custody whether in a secure facility or under a less restrictive alternative under any provision of this chapter. Reimbursement may be obtained by the department for the cost of care and treatment of persons committed to its custody whether in a secure facility or under a less restrictive alternative pursuant to RCW 43.20B.330 through 43.20B.370. [1995 c 216 § 14; 1990 c 3 § 1011.]

71.09.115 Record check required for employees of secure facility.

(1) The safety and security needs of the secure facility operated by the department of social and health services pursuant to RCW 71.09.060(1) make it vital that employees working in the facility meet necessary character, suitability, and competency qualifications. The secretary shall require a record check through the Washington state patrol criminal identification system under chapter 10.97 RCW and through the federal bureau of investigation. The record check must include a fingerprint check using a complete Washington state criminal identification fingerprint card. The criminal history record checks shall be at the expense of the department. The secretary shall use the information only in making the initial employment or engagement decision, except as provided in subsection (2) of this section. Further dissemination or use of the record is prohibited.

(2) This section applies to all current employees hired prior to June 6, 1996, who have not previously submitted to a department of social and health services criminal history records check. The secretary shall use the information only

in determining whether the current employee meets the necessary character, suitability, and competency requirements for employment or engagement. [1996 c 27 § 1.]

71.09.120 Release of information authorized.

In addition to any other information required to be released under this chapter, the department is authorized, pursuant to RCW 4.24.550, to release relevant information that is necessary to protect the public, concerning a specific sexually violent predator committed under this chapter. [1990 c 3 § 1012.]

71.09.130 Notice of escape or disappearance.

In the event of an escape by a person committed under this chapter from a state institution or the disappearance of such a person while on conditional release, the superintendent or community corrections officer shall notify the following as appropriate: Local law enforcement officers, other governmental agencies, the person's relatives, and any other appropriate persons about information necessary for the public safety or to assist in the apprehension of the person. [1995 c 216 § 16.]

71.09.140 Notice of conditional release or unconditional discharge—Notice of escape and recapture.

(1) At the earliest possible date, and in no event later than thirty days before conditional release or unconditional discharge, except in the event of escape, the department of social and health services shall send written notice of conditional release, unconditional discharge, or escape, to the following:

(a) The chief of police of the city, if any, in which the person will reside or in which placement will be made under a less restrictive alternative;

(b) The sheriff of the county in which the person will reside or in which placement will be made under a less restrictive alternative; and

(c) The sheriff of the county where the person was last convicted of a sexually violent offense, if the department does not know where the person will reside.

The department shall notify the state patrol of the release of all sexually violent predators and that information shall be placed in the Washington crime information center for dissemination to all law enforcement.

(2) The same notice as required by subsection (1) of this section shall be sent to the following if such notice has been requested in writing about a specific person found to be a sexually violent predator under this chapter:

(a) The victim or victims of any sexually violent offenses for which the person was convicted in the past or the victim's next of kin if the crime was a homicide. "Next of kin" as used in this section means a person's spouse, parents, siblings, and children;

(b) Any witnesses who testified against the person in his or her commitment trial under RCW 71.09.060; and

(c) Any person specified in writing by the prosecuting attorney.

Information regarding victims, next of kin, or witnesses requesting the notice, information regarding any other person specified in writing by the prosecuting attorney to receive the notice, and the notice are confidential and shall not be available to the committed person.

(3) If a person committed as a sexually violent predator under this chapter escapes from a department of social and health services facility, the department shall immediately notify, by the most reasonable and expedient

means available, the chief of police of the city and the sheriff of the county in which the committed person resided immediately before his or her commitment as a sexually violent predator, or immediately before his or her incarceration for his or her most recent offense. If previously requested, the department shall also notify the witnesses and the victims of the sexually violent offenses for which the person was convicted in the past or the victim's next of kin if the crime was a homicide. If the person is recaptured, the department shall send notice to the persons designated in this subsection as soon as possible but in no event later than two working days after the department learns of such recapture.

(4) If the victim or victims of any sexually violent offenses for which the person was convicted in the past or the victim's next of kin, or any witness is under the age of sixteen, the notice required by this section shall be sent to the parents or legal guardian of the child.

(5) The department of social and health services shall send the notices required by this chapter to the last address provided to the department by the requesting party. The requesting party shall furnish the department with a current address.

(6) Nothing in this section shall impose any liability upon a chief of police of a city or sheriff of a county for failing to request in writing a notice as provided in subsection (1) of this section. [1995 c 216 § 17.]

71.09.200 Escorted leave—Definitions.

For purposes of RCW 71.09.210 through 71.09.230:

(1) "Escorted leave" means a leave of absence from a facility housing persons detained or committed pursuant to this chapter under the continuous supervision of an escort.

(2) "Escort" means a correctional officer or other person approved by the superintendent or the superintendent's designee to accompany a resident on a leave of absence and be in visual or auditory contact with the resident at all times.

(3) "Resident" means a person detained or committed pursuant to this chapter. [1995 c 216 § 18.]

71.09.210 Escorted leave—Conditions.

The superintendent of any facility housing persons detained or committed pursuant to this chapter may, subject to the approval of the secretary, grant escorted leaves of absence to residents confined in such institutions to:

(1) Go to the bedside of the resident's wife, husband, child, mother or father, or other member of the resident's immediate family who is seriously ill;

(2) Attend the funeral of a member of the resident's immediate family listed in subsection (1) of this section; and

(3) Receive necessary medical or dental care which is not available in the institution. [1995 c 216 § 19.]

71.09.220 Escorted leave—Notice.

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71.09.230 Escorted leave – Rules.

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71.09.900 Index, part headings not law – 1990 c.3 See RCW 18.155.900

71.09.901 Severability – 1990 c.3 See RCW 18.155.901

71.09.902 Effective dates – Application – 1990 c.3 See RCW 18.155.902.

No. 64100-5

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF

RICHARD TURAY,

Respondent/Appellant.

APPEAL FROM
KING COUNTY SUPERIOR COURT

NO. 91-2-10539-1

OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ASSIGNMENTS OF ERROR 1

ISSUES RELATING TO ASSIGNMENTS OF ERROR . . 3

STATEMENT OF THE CASE 6

I. Factual Background Concerning Richard. . . 6

II. First Trial 8

III. Turay v. Weston 8

IV. Second Trial 9

V. Post-Trial 14

ARGUMENT 15

I. RICHARD MADE A CLEAR, TIMELY AND UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF. THE TRIAL COURT MADE NO FINDING THAT HE WAS INCOMPETENT TO DO SO. THE TRIAL COURT'S DECISION WAS REVERSIBLE, STRUCTURAL ERROR UNDER GODINEZ V. MORAN 15

A. Richard's Request and the Trial Court's Ruling 15

B. The Trial Court's Decision to Deny Self-Representation Was Reversible, Structural, Error 17

II. THE TRIAL COURT CORRECTLY RULED THAT RCW 71.09'S ANNUAL REVIEW PROVISIONS VIOLATE THE EQUAL PROTECTION GUARANTY AND ITS ALLOCATION OF THE BURDEN OF PROOF VIOLATES DUE PROCESS PROTECTIONS; THE REMEDY, HOWEVER, IS VOIDING THE UNCONSTITUTIONAL LAW, NOT A JUDICIAL REWRITE 20

A. The Trial Court's Decision. 20

B. RCW 71.09's Yearly Review Provisions Violate Equal Protection Guarantees 22

C. This Result is also Compelled By the Washington Constitution 25

D. RCW 71.09's Annual Review Provisions Violate Due Process Protections 32

E. The Remedy is Release, Not a Judicial Rewrite of an Unambiguous Statute 34

III. THE CONDITIONS AT SCC ARE PUNITIVE AS APPLIED, EVEN IF THAT WAS NOT THE LEGISLATURE'S INTENT. RICHARD'S DETENTION, IN A SECURE FACILITY WITH NO APPROPRIATE

TREATMENT, THEREFORE VIOLATES THE DOUBLE JEOPARDY CLAUSE 39

A. The Trial Court's Decision 39

B. The Question for this Court in Deciding Whether the Double Jeopardy Clause Bars Richard's Confinement is Whether that Confinement, as Applied, Constitutes "Punishment" 44

C. The Conditions of Confinement are Relevant to Whether RCW 71.09 is Punitive As Applied, Under Controlling Double Jeopardy Decisions 45

D. The Conditions at SCC are Relevant to Whether that Confinement Constitutes Punishment Under Civil Commitment Cases 47

E. Mr. Turay's Current Confinement Lacks Adequate Treatment and, Hence, Constitutes Punishment 50

F. Trial Court was Clearly Erroneous in Finding that SCC's Treatment of Richard is Constitutionally Adequate 51

G. Conclusions re Conditions at SCC 54

IV. FOLLOWING UNITED STATES V. OLD CHIEF, THIS COURT SHOULD RECONSIDER ITS RULING THAT ALL

EVIDENCE OF THE PRIOR CRIMES THAT FORM ELEMENTS OF THE SEXUAL PREDATOR LAW ARE ADMISSIBLE 55

A. The Trial Court's Ruling 55

B. The Trial Court Erred in Admitting Victim Testimony, Expert Testimony, and Court Records Describing the Details of the Prior Rapes, Since Richard Offered to Stipulate to the Prior Convictions 58

V. THE CONDITIONS OF CONFINEMENT AT SCC, ESPECIALLY THE ABSENCE OF NEUROPSYCHOLOGICAL TREATMENT APPROPRIATE FOR RICHARD, WAS RELEVANT TO THE "LESS RESTRICTIVE ALTERNATIVE" ISSUE. EXCLUSION OF RICHARD'S ENTIRE DEFENSE ON THIS ISSUE WAS REVERSIBLE, CONSTITUTIONAL ERROR. 60

A. The Trial Court's Ruling. 60

B. The Excluded Evidence Was Relevant and Powerful 63

C. Exclusion of Powerful Exculpatory Evidence Proffered by the Defense Violates the Rights to Due Process and to Present a Defense. 64

VI. RCW 71.09 IS UNCONSTITUTIONAL ON ITS FACE 66

VII. IF THIS COURT FINDS THE APPEAL IS UNTIMELY, THE FAILURE TO FILE A TIMELY NOTICE OF APPEAL WAS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AND THE RESULTING WAIVER OF APPEAL WAS NOT KNOWING, INTELLIGENT OR VOLUNTARY 67

A. The State's Contention 67

B. The Notice of Appeal is Timely with Respect to the Order of Commitment, Because a Timely Filed Motion for New Trial Tolled the Time for Appeal 68

C. Richard Did Not Knowingly, Intelligently and Voluntarily Relinquish his Right to Appeal, and That is the Standard that Should Apply to Waiver of the Right to Appeal a Commitment Order Under RCW 71.09 70

D. Timely filed Pre-Trial Motions Concerning the Validity of Mr. Turay's Detention Were Not Decided Until Two and a Half Years After the Order of Commitment was Entered; the Trial Court's May 9, 1996, Order, Which Finally Decided Those Conditions Claims, Should Therefore be Considered the Final Order in These Commitment Proceedings 75

VIII. DENIAL OF MR. TURAY'S REQUEST TO SEAL PROCEEDINGS TO PROTECT HIS PRIVACY VIOLATED THE EQUAL PROTECTION CLAUSE 78

A. The Trial Court's Ruling 78

B. The Trial Court's Denial of Mr. Turay's Timely Request to Seal Proceedings Violated the Equal Protection Clause 78

IX. THIS COURT IN YOUNG HELD THAT THE STATE MUST PROVE ITS CASE BEYOND A REASONABLE DOUBT. THE JURY INSTRUCTIONS HERE REDUCED THAT BURDEN TO A PREPONDERANCE 79

A. The Trial Court's Instructions and Defendant's Exceptions 79

B. The Trial Court's Instructions Undermine the Beyond a Reasonable Doubt Standard of Proof 81

C. The Error is Presumed Prejudicial 83

CONCLUSION 85